

**LODI CITY COUNCIL  
SPECIAL CITY COUNCIL MEETING  
CARNEGIE FORUM, 305 WEST PINE STREET  
MONDAY, APRIL 12, 2004**

**A. CALL TO ORDER / ROLL CALL**

The Special City Council meeting of April 12, 2004, was called to order by Mayor Hansen at 4:33 p.m.

Present: Council Members – Beckman, Hitchcock, Howard, Land, and Mayor Hansen

Absent: Council Members – None

Also Present: City Manager Flynn, Interim City Attorney Schwabauer, and City Clerk Blackston

**B. REGULAR CALENDAR**

- I-1 “Approve Special Allocation for expenses incurred by outside counsel relative to the Environmental Abatement Program (EAP) litigation (\$196,951.05)”

Interim City Attorney Schwabauer reported that Barger & Wolen’s bill for \$94,009.49 covers its services from December 9, 2003 through January 31, 2004. Mr. Schwabauer noted that he excised \$13,000 from the bill for further discussions. Kronick, Moskovitz, Tiedemann & Girard’s (KMTG) bill for \$100,936.58 is for the month of February. He emphasized that Council will need to make a decision in the near future regarding a source of funds for paying upcoming bills of outside counsel. He believed that most of the Barger & Wolen bills and a significant portion of the KMTG bills will not be paid by the City’s insurance carrier because they do not involve defense of claims.

In answer to Council Member Land, Mr. Schwabauer explained that the majority of the Barger & Wolen bills were for services that were authorized by the Council vote that hired the firm on December 9, including issues related to Lehman Brothers and work it did in the transition between lawyers. Mayor Hansen added that Barger & Wolen also worked in conjunction with KMTG on preparing some of the documents related to the Environmental Abatement Program (EAP) litigation. The audit of Envision Law Group is on hold pending a response from the City’s insurance carrier.

Mr. Schwabauer stated that the following expenses would be deducted from the \$50,000 that was previously appropriated by Council to the City Attorney’s Office:

- Approximately \$3,000 for KMTG services pertaining to the deputy city attorney role, e.g. providing advice to department heads, etc;
- Approximately \$4,700 for KMTG services related to the case of Rogers v. County of San Joaquin; and
- Approximately \$1,000 for KMTG services related to the case of Phelps v. City of Lodi

Work that KMTG performed in the amount of \$5,000 with regard to the Wastewater Certificates of Participation will be included in the cost of the financing. The remainder of KMTG’s cost of services would be deducted from the Water Fund.

In reply to Mayor Pro Tempore Beckman, Council Member Land explained that he would be voting against the motion to approve a special allocation for expenses incurred by Barger & Wolen. He felt that a conflict of interest existed for which the firm had originally stated it would not continue representing; however, it later changed its position and is continuing to represent the claim.

**MOTION:**

Mayor Pro Tempore Beckman made a motion, Hansen second, to approve the Special Allocation in the amount of \$196,951.05 for expenses incurred by outside counsel relative to the EAP litigation.

DISCUSSION:

Council Member Howard commented on the difficulty that Council finds itself in the current situation where the increase in workload between regular day to day matters, in addition to the EAP litigation, has resulted in the majority of Council authorizing Barger & Wolen to conduct services above and beyond the original intent of the audit.

Council Member Hitchcock contended that the City's current situation is a result of having been taken advantage of. She spoke in favor of pursuing the audit/investigation, as she did not want to see anyone get away with activities that cost taxpayers millions of dollars.

Mayor Hansen concurred with Ms. Hitchcock's comments. He expressed dismay that Council Member Land would not vote in favor of the authorization of payment for these services when he was involved in some of the decisions that led the City to its current position. He outlined two options: 1) decide not to spend any additional money to pursue the matter any further regardless of what has taken place up to this point; or 2) do whatever is possible within a reasonable framework to hold individuals responsible for their actions and attempt to recover funds. He pointed out that the City was forced to deal with the issues that Barger & Wolen and KMTG have been working on to protect the City's interest, and their legal fees are more reasonable than what the City incurred in the past. In reference to Mr. Land's concern related to Barger & Wolen's conflict of interest, Mr. Hansen noted that it has been waived by all parties within the prescribed standards of the State Bar of California.

Council Member Land reiterated his concern that Barger & Wolen changed its stance on continuing to represent the company it had a conflict with after agreeing to work for the City and he intimated that it was a conflict of such significance that it should not be waived. He noted that for the past three and a half years the City has not paid anything to the attorneys representing it in the EAP litigation, because it was being paid from insurance proceeds.

Mayor Hansen replied that the majority of funds came from the Lehman Brothers financing, which has been depleted, and only a small amount of that has been refunded.

In response to Council Member Land's comments, Council Member Hitchcock countered that the City paid \$25 million to its former counsel and the debt is continuing to increase due to the loan interest of nearly 30%. She reported that many of the recently submitted "Requests for Information – Legal Services" proposals have indicated that the past strategy had been a folly from the start. The City now finds itself in the position of beginning again and whichever firm it hires to represent it in the EAP litigation will cost millions of dollars on top of what has already been spent.

VOTE:

The above motion carried by the following vote:

Ayes: Council Members – Beckman, Hitchcock, Howard, and Mayor Hansen

Noes: Council Members – Land

Absent: Council Members – None

- I-2 "Discussion and direction regarding Notice of Intention to Circulate Petition submitted March 30, 2004, to the Lodi City Clerk's Office by Elizabeth M. Fiske, Glenda Hesseltine, and Walter Pruss"

Interim City Attorney Schwabauer reported that during the process of preparing the ballot title and summary for the proposed initiative, Community Development Director Bartlam and Public Works Director Prima brought to his attention that it addresses only C-1 and C-2 zoning areas; however the Lodi Zoning Code allows retail commercial to be constructed in any zoning designation with the exception of residential. In addition, Mr. Schwabauer

expressed concern that the proposed initiative requires the City Council to amend the general plan and other planning documents to make them consistent with the initiative. He believed the initiative was flawed by imposing an obligation on a governmental entity to make an amendment that is yet to be decided. He felt it would be worthwhile to explore with the initiative proponents what they intend the initiative to cover, for instance, a building in excess of 100,000 square feet that has five different companies operating within it.

Mayor Hansen was in favor of Mr. Schwabauer working with the initiative proponents to ensure that the ballot measure is legal on its face.

Mayor Pro Tempore Beckman encouraged the initiative proponents to ask questions of Mr. Schwabauer to make sure they have a legally sound document that appropriately addresses their intent.

Council Member Howard commented that based on the 'Ballot Box Planning' guide published by the Institute of Local Self Government, the City's role is one of administration and it should be careful not to show bias or sway the proponents in drafting the initiative. She believed it was appropriate for Mr. Schwabauer to communicate his concerns to the citizens group with a focus on what is legally correct and complements the City's policies.

Council Member Hitchcock felt it was the City's obligation to help the initiative proponents in meeting their intent by asking probing questions about what they are trying to accomplish. It was her understanding that if the initiative passed it would be incumbent upon the City to make sure its laws were consistent with the general plan and make amendments accordingly.

Mr. Schwabauer stated that if an initiative were to pass that was inconsistent with the general plan it would not be legal. The initiative would need to cure any inconsistencies with the general plan at the time it was passed.

Council Member Land agreed that the City should not participate in drafting the initiative, but should assist the citizens group by asking questions that would allow them to recognize where they might want to make amendments to better meet their aims.

#### PUBLIC COMMENTS:

- Ann Cerney, representing the Small City Preservation Committee, felt that the matters can be addressed without much difficulty and the Committee can come to an accord with the City regarding the initiative wording. The Committee intends to have its attorney contact Mr. Schwabauer as soon as possible so that changes can be made to satisfy the concerns that have been raised.

Mayor Hansen stated that he would be scheduling a meeting with Ms. Cerney and Ms. Fiske to discuss the moratorium issue. He believed that their concerns and the City's were similar. Following their discussion he would report to Council whether or not differences can be resolved.

#### MOTION / VOTE:

There was no Council action taken on this matter.

### C. CLOSED SESSION

At 5:11 p.m., Mayor Hansen adjourned the Special City Council meeting to a Closed Session to discuss the following matter:

- B-1 Actual Litigation: Government Code §54956.9(a); one case; City of Lodi, a California Municipal Corporation, and Lodi Financing Corporation, a California nonprofit corporation v. Lehman Brothers, Inc. and US Bank National Association, United States District Court, Eastern District of California, Case No. CIV. S-04-0606 MCE-KJM

The Closed Session adjourned at 6:35 p.m.

D. RETURN TO OPEN SESSION / DISCLOSURE OF ACTION

At 6:35 p.m., Mayor Hansen reconvened the Special City Council meeting, and Interim City Attorney Schwabauer disclosed that no reportable action was taken in closed session.

E. ADJOURNMENT

There being no further business to come before the City Council, the meeting was adjourned at 6:36 p.m.

ATTEST:

Susan J. Blackston  
City Clerk